IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8140 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BANCO PRODUCTS (INDIA) LTD.

Versus

PRAVINCHANDRA BHOGILAL PATEL

Appearance:

1. Special Civil Application No. 8140 of 2001

MR KM PATEL for Petitioner No. 1

MR MS MANSURI for Respondent No. 1

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 19/02/2002

ORAL JUDGEMENT

The petitioner has preferred this petition challenging the legality and validity of the award dated 4.9.2000 passed by the Labour Court at Vadodara in Ref

(LCV) No.2/91 whereby the labour court has directed the reinstatement of the respondent-workman with 75% backwages and other consequential benefits.

2. Short facts leading to the present petition are that the respondent was working with the petitioner as the stores clerk in the finished goods stores department. The petitioner is an Engineering Company engaged in the manufacturing of gaskets and radiators. The petitioner is also exporting the goods to foreign countries. As per the petitioner, it was the duty of the respondent-workman to get checked and prepared the consignments which were to be despatched to parties at foreign countries and in the present case three consignments which were to be despatched to one Premier Parts and Industrial Supplies Corporation, Philippines was not supervised by the respondent-workman, and in reality, the said party had placed the order for 100 gaskets and 170 cylinder head gaskets and the said material was to be despatched to them. Inspite of that, the respondent workman prepared the packages of other goods which were really meant for being despatched to one party in Sri Lanka, known as "Lankan Motor Sales and Finance Limited. On account of aforesaid lapse on the part of the respondent-workman, it is the case of the petitioner, that the purchasing party at Philippines not only returned the goods ordered, but the petitioner had to suffer financial loss of Rs.82,000/- and additionally the petitioner had also to suffer the market set-back on account of adverse affect on the reputation of the petitioner in the international market as the exporter of goods in question. On account of said incident, the petitioner had issued chargesheet to the respondent workman together with one M.F.Patel, who was also working as the Supervisor in the stores department. Shri M.F.Patel was also placed under suspension and subsequently Shri M.F.Patel submitted his resignation. So far as the petitioner is concerned, the departmental inquiry was held and the inquiry officer found that the charges of misconduct of gross negligence in duty are proved. It may be stated that the petitioner was also placed under suspension pending inquiry. After the inquiry was over the respondent workman was afforded opportunity. However, the petitioner in the capacity as the employer took the decision that the misconduct is a gross negligence in duty and it is a serious misconduct and therefore dismissed the respondent workman from service by order dated 26.7.1990.

3. It appears that thereafter the respondent workman raised dispute under Industrial Disputes Act (hereinafter referred to as "the Act") and the said dispute was,

ultimately, referred to the labour court at Vadodara being Ref.(LCV) No.2/91 for adjudication. Pending the proceedings before the labour court the petitioner had submitted an application Exh.8, dated 8.10.1991, copy whereof is also produced in the proceedings before this court at annexure "D". In the said application it was contended by the respondent workman, interalia, that the allegations in the chargesheet were that of a minor misconduct and therefore the application for deciding the preliminary issue was submitted requesting the labour court to decide the issue as to whether the allegations in the chargesheet can be treated as minor misconduct or not and, for the said minor misconduct whether the punishment other than that of censure or warning can be imposed upon the workman or not. The application Exh.8 came to be decided by the labour court as per the order dated 12.12.1994 and while deciding the said application at para 7 of the said order it was, interalia, found by the labour court that on account of negligence of the workman the reputation of the employer is damaged and therefore the misconduct is a serious misconduct and the labour court found that the matter can not be decided only on the basis of chargesheet and therefore the labour court rejected the application. Thereafter, the labour court adjudicated the matter, and it is pertinent to note that before the labour court also the respondent workman had given pursis declaring that he has abandoned the legality and validity of the inquiry and he has accepted the inquiry. However, his only contention was that the findings of the inquiry officer are without proper application of mind and it was further contended by the respondent workman that the punishment of dismissal imposed upon him is disproportionate to the misconduct. The labour court after examining the matter observed that at the most it can be said to be negligence and the negligence can not be said to be a serious misconduct and the labour court found that there was no intention on the part of the respondent workman to cause financial loss to the employer, and therefore, the labour court found that the punishment is disproportionate to the misconduct and observed that if the 75% backwages are awarded, the same would meet with the ends of justice and therefore ultimately the labour court directed for reinstatement with 75% backwages and it is that award which is under challenge before this court by the present petition.

4. I have heard Mr.K.M.Patel, learned advocate appearing for the petitioner as well as Mr.M.S.Mansuri, learned advocate appearing for the respondent workman. It is contended by Mr.K.M.Patel appearing for the petitioner that the inquiry is already admitted by the

workman and the findings are factually admitted by the workman. It is, further, contended by Mr.Patel that while passing the order, dated 12.12.1994 the labour court has observed that causing damage to the reputation of the petitioner is a serious misconduct and the said order dated 12.12.1994 is not reversed by any higher forum and thereafter while taking final decision the labour court has given a totally contrary finding observing that it is a case of mere negligence and it can not be said to be a serious misconduct. In the contention of Mr.Patel, if the labour court accepts the guilt of the respondent workman, in the judgment, in any case, the labour court could not have awarded any backwages because the petitioner-Company has not only suffered financial loss of about Rs.82,000/-but has also suffered loss of reputation in the business and instead of compensating the same the labour court has passed the award awarding 75% backwages which resulted into imposing more penalty upon the employer. In the contention of Mr.Patel causing financial to the extent of about Rs.82,000/- and causing damage to the reputation in international market is a serious misconduct and when the charges are found proved and not even upset by the labour court and when the petitioner in the capacity of employer has taken decision of imposing penalty of dismissal, it can not be said that the case was such which would call for interference by the labour court in purported exercise of powers under section 11A of the Act for substitution of penalty, that too to the extent of not only reinstatement but with awarding 75% backwages. It is also contended by Mr.Patel that the labour court has considered the aspect that another peon who was working in the stores department is imposed punishment of suspension of service for three days by ignoring the fact that the duty of the said workman was altogether different. He further contended that when the Supervisor on his own resigned from service there was no necessity on the part of the petitioner to take any further disciplinary action since pending suspension, of his own the Supervisor-Mr.M.F.Patel resigned from service. Mr.Patel in support of his submission relied upon the decision of this court in the matter of Gujarat Mineral Development Corporation vs Jayant Shriram Kalal reported in 2000(3) GLH 419 to contend that withholding of backwages can not be sufficient punishment and he further relied upon the decision of this court in the matter of Victor F.Parmar vs Elecon Engineering Co.Ltd reported in 2000(1) GLR 877 for contending that the labour court should not mechanically exercise powers under section 11A of the Act and in the submission of Mr.Patel the labour court has not given cogent reasons for exercising powers

under section 11A of the Act.

5. On the other hand, Mr.Mansuri learned advocate appearing for respondent workman contended that there is no proof of misconduct, and in any case, the misconduct which is alleged is of a minor in nature. He has further contended that nothing has come on evidence that any loss has been caused to the petitioner and it was only an allegation of mere negligence. In the submission of Mr.Mansuri the despatch work was being looked after by an entire group and it was not the sole duty of the respondent workman and therefore it can not be said that the respondent workman has committed any negligence which can be said to be misconduct for the purpose of imposing heavy penalty of dismissal. Mr.Mansuri has tried to emphasise that even if the inquiry reports are considered the negligence is not proved and since it was a collective work no evidence has come on the record that the petitioner company had suffered any loss actually. Mr.Mansuri further emphasised that there is no allegation of malafide intention on the part of the workman and therefore the labour court has rightly exercised the powers and substituted the penalty. Mr.Mansuri has also relied upon the judgment of the Apex Court in the matter of The Workmen of M/s Firestone Tyre & Rubber Co.of India (Pvt.)Ltd vs the Management and others reported in 1973(1) LLJ 278 to contend that "on account of insertion of section 11A in the Act the tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct but also to differ from the said finding if a proper case is made out". Mr.Mansuri also relied upon the judgment of this court in the matter of Navinchandra Shakerchand Shah vs Ahmedabad Cooperative Department Stores Ltd reported in 1979(1) LLJ 60 to contend that mere lapse will not amount to gross negligence. He has also relied upon the judgment of this court in the matter of Ahmedabad New Textile Mills vs Textile Labour Association, Ahmedabad reported in 1988(2) GLR 1324 to contend that the labour court has jurisdiction to substitute the penalty if it finds that such a punishment ought not to have been imposed by the employer. Mr.Mansuri has also relied upon the judgment of the Apex Court in the matter of Roshan Deen vs Preeti Lal reported in 2002(1) GLR 4 to contend that the scope of judicial scrutiny of this court is very limited and the same is to advance the justice and not to thwart it.

6. Before I deal with the factual aspect of the case, it is necessary to consider the case law on the point of scope of exercise of the power under section 11A of the Act by the labour court for substituting penalty.

In case of Gujarat Mineral Development Corporation vs Jayant Shriram Kalal reported in 2000(3) GLH 419 this court (S.K.Keshote,J) after considering various decisions observed that "no doubt Section 11A of the Act empowers the labour court to interfere with the penalty inflicted upon workman by the management in appropriate case but it is not a free power where it can do anything what it likes. Sufficient guidelines are to be taken from the courts' decisions and only where punishment is disproportionate or harsh or touching the conscience of the labour court, interference could have been made but not a rule or right. In such cases, if the award is passed by the labour court of reinstatement with 30% backwages then it will certainly turn into perverse awards. In fact, for the grave and serious misconduct, awarding of backwages would be a lottery to the workman. In the matter of Victor F.Parmar vs Elecon Engineering Co.Ltd reported in 2000(1) GLR 877 this court (H.K.Rathod,J) observed that "the labour court should not mechanically use the words 'punishment being disproportionate to the charges'. The labour court is required to give reasons as to why the the punishment is grossly disproportionate. The discretionary powers can not be equated with the power of veto." Therefore, I am of the view that it is true that under section 11A of the Act, the labour court has power to reappreciate the evidence and the inquiry and it has the power to substitute the penalty. However, before exercising power under section 11A, it is necessary for the labour court to examine as to whether the finding of the inquiry officer regarding the proof of charges or as to whether the charges are proved or not is correct. If it is found by the labour court that the charges are proved, then it has to examine the second aspect as to whether the misconduct which is proved is such which would call for the same punishment as imposed by the employer. While examining the second aspect of the case, the labour court has to keep in mind whether any prudent employer having sound rationale would have imposed such penalty in a case of misconduct which is proved. If the labour court comes to conclusion that no prudent employer would have imposed such penalty upon the employee, in such type of misconducts, then only the power under section 11A of the labour court will be attracted, and only under those circumstances, the labour can exercise power under section 11A for the purpose of substituting the penalty. Therefore, as stated above, this court has also held in earlier decision that the power under section 11A of the Act is not be mechanically exercised nor such power should be used as veto. Therefore, while exercising power under section 11A of the Act, the labour court has

to tilt the balance and has to take a prudent view as to whether the punishment is as such totally disproportionate to the gravity of the misconduct or not and if the labour court comes to conclusion that any prudent employer in such type of misconducts would not have taken decision of imposing same penalty then in such circumstances the labour court will assume jurisdiction and substitute penalty under section 11A of the Act. However, if the labour comes to conclusion that no prudent employer in a case of misconduct would impose such heavy penalty then it is obligatory to the labour court to examine as to what suitable punishment would have been imposed by the prudent employer in a case of misconduct which is proved. The labour court will have power to substitute the penalty only to that extent and not beyond that. The labour court has also to keep in mind that while substituting penalty no undue benefits are conferred upon the person who has committed misconduct, that too at the cost of the other party. I am of the view that the aforesaid are the basic considerations which were required to be examined by the labour court while exercising power under section 11A of the Act, and keeping in mind the aforesaid considerations the present case will have to be examined.

7. A perusal of the record before the labour court shows that initially while deciding the application-Exh.8 as the preliminary issue, as per the order dated 12.12.1994, it was found by the labour court that on account of negligence of the workman, the reputation of the employer is damaged and the same is a serious misconduct. However, the perusal of the award shows that the labour court at para 56 has found that the misconduct of negligence is committed by the workman in discharge of his duty but it is observed by the labour court in the award that the misconduct is not such serious misconduct which would require the employer to dismiss the workman from service. The labour court has further found that the respondent workman has not intentionally with malafide intention caused loss to the employer. Once the labour court in the award has found that the negligence is committed by the workman in discharge of his duty and the said misconduct is proved I can not accept the contention made by Mr.Mansuri to reappreciate the evidence which he has produced with the affidavit-in-reply pertaining to inquiry report. It is well settled that under Constitution the scope of judicial review can not be extended to reappreciate the evidence for which the decision and finding is already recorded by the labour court. When the labour court has recorded the finding that the misconduct of negligence is

proved in a petition preferred by the petitioner-employer challenging the award this court can not reappreciate the evidence and upset the finding, that too, at the instance of the respondent who has accepted the award of the labour court. Therefore, I do not find any substance in the contention raised by Mr.Mansuri that the misconduct is merely an allegation only and the allegations of misconduct are not proved.

8. The second aspect which is considered by the labour court is that there is no intentional negligence committed by the respondent-workman for causing loss to the petitioner-employer. It is true that while testing the gravity of negligence, whether it is intentional or not is one of the relevant circumstances, but it is not that in every case of negligence, if the malafide intention is not the there, would be rendered as minor misconduct. For example, a watchman remaining negligent in discharging his duties, for about two hours, may cause heavy loss to the employees and would attract the serious misconduct whereas a person who is having no responsible post remains negligent for the whole day and as a result thereof any damage pr otherwise is caused, may result into a minor misconduct. Therefore, the approach of the labour court of lowering down the gravity of misconduct only on the ground that the same was not intentional is erroneous on the face of it. The labour court ought not to have last sight of important aspects of the fact that on account of such misconduct the employer has suffered loss of about Rs.82,000/- and further more serious loss by way of damage of reputation in the international market. Since the negligence has resulted into loss of Rs.82,000/- and since it has also resulted into damage to reputation of the employer in the international market I am of the view that no employer would have taken any lenient view with the employee, more particularly, when the charges are found proved and even accepted by the labour court. Under the circumstances, when the misconduct proved was met with major penalty which any prudent employer would have imposed upon the employer, the labour court ought not to have mechanically exercised the powers under section 11A of the Act.

9. Matter does not rest there, but the labour court while considering the proportion of penalty has also not examined that if 75% backwages are awarded the employer who has suffered with the loss of Rs.82,000/- and damage of reputation of business in the international market would further to be meted with penalty of paying backwages of 75% for no no fault on his part. I am told that the amount of backwages is calculated by Mr.Patel

would be roughly about Rs.2 lacs. If the 75% backwages are awarded to the employee, in the present case, it would result into allowing the workman to have the undue benefit of his own wrong and to make employer suffer. The labour court, in my view, while awarding backwaes of 75%, has not only exceeded its jurisdiction but its decision of substituting the penalty is perverse to the record of the case and would result into causing great injustice to the employer for no fault on his part.

10. Considering overall facts and circumstances of the case, I am of the view that since the negligence of the workman was not intentional, the labour court, at the most, would have substituted the penalty by reinstatement without any backwages.

11. Under the circumstances, I am of the view that only reinstatement of workman would meet with the ends of justice and in any case he would not be entitled to any backwages from the employer.

12. In the result, the petition is partly allowed to the extent that the award dated 4.9.2000 is modified by giving directions to reinstate the respondent-workman in service within 30 days from the date of receipt of writ of this court. It is clarified that the respondent-workman would not be entitled to any backwages from the date of dismissal till reinstatement as directed hereinabove.

13. Rule is made absolute to the aforesaid extent only with no order as to costs.

19.2.2002 (JAYANT PATEL,J)